

FILED BY CLERK

JAN 27 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0251-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
EARL DEWAYNE CAIN,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR930394

Honorable Robert Duber II, Judge

REVIEW GRANTED; RELIEF DENIED

Daisy Flores, Gila County Attorney
By June Ava Florescue

Globe
Attorneys for Respondent

Earl D. Cain

Florence
In Propria Persona

K E L L Y, Judge.

¶1 In this, his fifth post-conviction proceeding, petitioner Earl Cain challenges the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and denying relief. Absent an abuse of discretion by the trial

court in determining whether post-conviction relief is warranted, we will not disturb its ruling. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 After a jury trial, Cain was convicted of multiple counts of sexual conduct with a minor and sentenced to mitigated, consecutive prison terms of fifteen and twenty-eight years, followed by terms of life imprisonment. He appealed the convictions and sentences, and this court affirmed them. *State v. Cain*, No. 2 CA-CR 94-0448 (memorandum decision filed June 6, 1995). In the years that followed, Cain repeatedly sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and, after the trial court denied each of the petitions he had filed, he sought review by this court. But we, too, found he had not established he was entitled to relief and concluded in each of these proceedings that the court had not abused its discretion in denying Cain's petitions. *See State v. Cain*, No. 2 CA-CR 2000-0231-PR (memorandum decision filed Dec. 21, 2000); *State v. Cain*, No. 2 CA-CR 2001-0358-PR (memorandum decision filed Dec. 13, 2001); *State v. Cain*, No. 2 CA-CR 2005-0188-PR (decision order filed Feb. 28, 2006); *State v. Cain*, No. 2 CA-CR 2005-0391-PR (memorandum decision filed June 27, 2006).

¶3 In the December 2010 petition Cain filed in this proceeding, and in his supplement to that petition, he asserted trial counsel had been ineffective during plea negotiations. Relying on *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), Cain asserted that before he rejected the plea agreement, defense counsel had not adequately explained the state's offer, particularly its "benefits" with respect to sentencing, the nature of the proposed ten-year prison term, Cain's eligibility for early release after serving a portion of that term, and the sentence he could be facing if convicted of the

charges in the indictment. He argued *Donald* was a significant change in the law under Rule 32.1(g), and although it had been decided in 2000, he did not have access to up-to-date legal materials and had just learned about the decision.

¶4 The trial court dismissed the petition, finding the claims were precluded, *see* Ariz. R. Crim. P. 32.2, and were not colorable. The court summarized the claims Cain had raised on appeal and in his earlier post-conviction proceedings, noting he previously had raised claims of ineffective assistance of counsel. The court did not abuse its discretion.

¶5 As the court correctly noted, a defendant generally is precluded from obtaining relief based on any ground under Rule 32.1 that has been adjudicated on appeal or in any previous collateral proceeding or, with respect to claims not excepted from the rule of preclusion, any ground that has been waived by the defendant's failure to raise the claim on appeal or in another proceeding. Ariz. R. Crim. P. 32.2(a)(2), (3). "[W]here ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded." *State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (emphasis omitted); *see also State v. Swoopes*, 216 Ariz. 390, ¶ 23, 166 P.3d 945, 952-53 (App. 2007) (same).

¶6 Cain seems to have attempted to avoid the preclusive effect of Rule 32.2(a) by bootstrapping the claim of ineffective assistance of counsel to the claim that *Donald* was a significant change of law, as contemplated by Rule 32.1(g), which is not subject to the rule of preclusion. *See* Ariz. R. Crim. P. 32.1(g), 32. 2(b). In its response to Cain's

petition for review, the state asserts that Cain filed three petitions for post-conviction relief since *Donald* was decided in September 2000, suggesting Cain could have raised the *Donald*-based claims in those proceedings. Although we cannot determine from the record before us when Cain's Rule 32 petition was filed in the proceeding we reviewed in No. 2 CA-CR 2001-0358-PR and decided in our December 13, 2001 memorandum decision, at the very least we can presume the petitions filed in his two post-conviction proceedings that most recently preceded the one before us were filed after *Donald* was decided. See No. 2 CA-CR 2005-0188-PR (decision order filed Feb. 28, 2006); No. 2 CA-CR 2005-0391-PR (memorandum decision filed June 27, 2006). The trial court did not abuse its discretion by essentially finding Cain had failed to state a meritorious reason for not raising a claim based on *Donald* for nearly ten years after it was decided. See Ariz. R. Crim. P. 32. 2(b) (successive notice of post-conviction relief subject to summary dismissal absent "meritorious reasons" claim omitted in previous petition).

¶7 In any case, even before *Donald* was decided, Cain could have relied on other authority in asserting a claim of ineffective assistance of counsel during plea negotiations. See, e.g., *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *State v. Bowers*, 192 Ariz. 419, ¶¶ 10-14, 966 P.2d 1023, 1026-27 (App. 1998). Cain did not sustain his burden of establishing the trial court abused its discretion when it found Cain could have raised a claim of ineffective assistance in prior post-conviction proceedings. Indeed, on review Cain focuses almost exclusively on the court's determination that the claim was not colorable.

¶8 Because the trial court’s summary dismissal of this, Cain’s fifth post-conviction relief proceeding, was proper based on Rule 32.2 and case law relating to the principle of preclusion, we need not decide whether the court was correct that his *Donald*-related claim was not colorable. The petition for review is granted, but for the reasons stated herein, relief is denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge